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10 UNITED STATES DISTRICT COURT FOR  
11 THE NORTHERN DISTRICT OF CALIFORNIA  
12 OAKLAND DIVISION

13 ELAINE L. CHAO, Secretary	) Case No.
of Labor, UNITED STATES	)
14 DEPARTMENT OF LABOR,	)
	)
15 Petitioner,	)
	) <b>MEMORANDUM OF POINTS AND</b>
16 v.	) <b>AUTHORITIES IN SUPPORT OF</b>
	) <b>PETITION TO ENFORCE</b>
17 MATTHEW J. DONNELLY d/b/a/ The	) <b>ADMINISTRATIVE SUBPOENA</b>
BUSINESS APPRAISAL INSTITUTE,	) <b>DUCES TECUM</b>
	)
18 Respondents.	)
19	)

20 This is an action brought by ELAINE L. CHAO, Secretary  
21 of Labor, United States Department Of Labor ("the Secretary"),  
22 to enforce compliance with an Administrative Subpoena *Duces*  
23 *Tecum* issued by the Regional Director of the Atlanta Regional  
24 Office of the Employment Benefits Security Administration  
25 ("EBSA") of the United States Department of Labor on March 13,  
26 2008, in connection with an ongoing investigation conducted  
27 pursuant to Section 504 of the Employee Retirement Income  
28

1 Security Act of 1974 ("ERISA"), 29 U.S.C. § 1134 (the  
2 "Subpoena"). This Court has jurisdiction over this Petition  
3 pursuant to Sections 9 and 10 of the Federal Trade Commission  
4 Act, 15 U.S.C. §§ 49 and 50, as made applicable to ERISA by  
5 Sections 504(c) and 502(e)(1) of ERISA, 29 U.S.C. §§ 1134(c) and  
6 1132(e)(1). This memorandum of law is submitted in support of  
7 the Secretary's petition to compel Respondents to produce  
8 documents as demanded by the Subpoena duly served upon  
9 Respondents.

10 This Petition requests this Court to issue an Order for  
11 Respondents to show cause why they should not produce all  
12 documents requested by the Subpoena. The requested documents  
13 are relevant to EBSA's investigation and Respondents' failure to  
14 provide the documents is impeding the Secretary's proper  
15 exercise of her lawful authority and responsibility to enforce  
16 and administer ERISA.

17 **I. FACTS**

18 Respondent Matthew J. Donnelly ("Donnelly") is a California  
19 resident residing at 180 2<sup>nd</sup> Street, Suite 419, Oakland,  
20 California 94607. Donnelly owns and conducts business as The  
21 Business Appraisal Institute ("BAI") pursuant to a Fictitious  
22 Business Name filed with the County of San Francisco on April 1,  
23 2003. Affidavit of Investigator Jennifer Del Nero In Support of  
24 Petition to Enforce Administrative Subpoena *Duces Tecum* ("JDN  
25 Aff.") at ¶ 4. Respondents provided valuation services to  
26 Bruister & Associates, Inc. ("Bruister"), a closely-held  
27 corporation, and the Plans for several transactions in which the  
28

1 Plans purchased Bruister stock from a Party-in-Interest. JDN  
2 Aff. at ¶ 3. Respondents provided similar valuation services to  
3 other ERISA-covered plans and plan sponsors in connection with  
4 similar transactions involving employer securities that have no  
5 generally recognized markets. JDN Aff. at ¶ 7. The amount  
6 ERISA-governed plans paid for employer securities for which  
7 Respondents provided the valuation are part of the subject of  
8 the EBSA investigation being conducted pursuant to ERISA §  
9 504(a), 29 U.S.C. § 1134(a). Id. at ¶¶ 3-7.

10 At all times relevant hereto, the Secretary, through the  
11 Atlanta Regional Office of EBSA, has been conducting an  
12 investigation of the Plans, including service providers and  
13 others related to the Plans, under ERISA § 504(a), 29 U.S.C. §  
14 1134(a), to determine whether any person has violated or is  
15 about to violate any provision of Title I of ERISA or any  
16 regulation or order promulgated thereunder. JDN Aff. at ¶ 2.

17 On March 20, 2008, EBSA served the Subpoena on Respondents,  
18 seeking the production of certain documents necessary for its  
19 investigation. Id. at ¶¶ 7, 9. The Subpoena required  
20 Respondent to produce the responsive documents by March 28,  
21 2008. Id. at ¶ 9.

22 On March 24, 2008, Respondents' attorney, Larry Israel,  
23 sent a fax acknowledging his clients' receipt of the Subpoena,  
24 and answered the Subpoena by asserting a few objections and  
25 stating that Respondents had no responsive documents other than  
26 those to which the objections applied. A true and accurate copy  
27 of the fax is attached as Exhibit B to the Del Nero Affidavit.  
28

1 Specifically, the Subpoena sought nine categories of documents.  
2 JDN Aff., Exh. A. The first concerns fees received for  
3 valuation services provided to the Plans. Respondents did not  
4 produce any responsive documents nor did they object to this  
5 request. JDN Aff. ¶¶ 11-12, Exh. B. Nevertheless, bank  
6 statements, tax records and a Quickbook systems that should show  
7 deposits of such fees are believed to be in Respondents'  
8 possession. JDN Aff. ¶ 8. The second category requests all  
9 documents related to the Plans. Respondents have produced the  
10 majority of these documents under a prior subpoena, but have  
11 refused to perform a thorough search and have indicated  
12 additional responsive documents exist.

13 The third and fourth categories request information to  
14 identify other ERISA-governed Plans for which Respondents have  
15 acted as a service provider. Respondents object to these  
16 requests as overly broad and burdensome and not relevant to  
17 EBSA's current investigation. JDN Aff., Exh. B. These  
18 objections are addressed below in section II.C. wherein the  
19 Secretary shows that the requests are not overly broad or  
20 burdensome, are sufficiently clear and concise, and are relevant  
21 to the current investigation.

22 Respondents do not object to the fifth through seventh  
23 categories of requested documents requesting all marketing  
24 materials, including communications, and any fee sharing  
25 agreements. Respondents are believed to have some marketing  
26 materials and emails and/or other communications discussing  
27 their services. JDN Aff. at ¶ 8. There is no dispute that fee  
28

1 agreements may not exist. The final two categories request all  
2 appraisals Respondents have performed for ERISA-governed plans  
3 and the underlying documentation for those appraisals. JDN  
4 Aff., Exh. A. Respondents have objected that these requests are  
5 "overly broad, ambiguous, vague, uncertain, and without clear  
6 meaning." JDN Aff., Exh. B. As discussed below in section  
7 II.C., these objections are patently frivolous.

8 Despite EBSA and the undersigned's good faith attempts to  
9 secure compliance with the Subpoena, Respondents have failed to  
10 produce responsive documents. *Id.* at ¶ 11. Because Respondent  
11 has failed to produce the required records, the Secretary filed  
12 the current Petition to secure this Court's assistance in  
13 obtaining the necessary documents.

## 14 **II. ARGUMENT**

### 15 A. An Administrative Subpoena *Duces Tecum* Issued Pursuant 16 to a Legitimate Investigation and that Seeks Reasonably Relevant Documents Must be Enforced.

17 As the Supreme Court held over fifty years ago in the  
18 seminal case of Oklahoma Press Publishing Co. v. Walling, 327  
19 U.S. 186, 201 (1946), an administrative subpoena enables a  
20 federal agency to fulfill its investigative burden; therefore,  
21 to invalidate an administrative subpoena is to question the  
22 power of Congress to delegate enforcement of federal laws. As a  
23 result of this Supreme Court holding, a proceeding brought to  
24 enforce an administrative subpoena is summary in nature.

25 E.E.O.C. v. Karuk Tribe Housing Authority, 260 F.3d 1071, 1078  
26 (9th Cir. 2001); EEOC v. St. Regis Paper Co., 717 F.2d 1302,  
27  
28

1 1304 (9th Cir. 1983); accord Oklahoma Press Publishing, 327 U.S.  
2 at 216-217.

3 The scope of the subpoena enforcement proceeding is narrow  
4 because of the important governmental interest in the  
5 expeditious investigation of possible unlawful activity.  
6 E.E.O.C. v. Children's Hospital, 719 F.2d 1426, 1428 (9th Cir.  
7 1983) (*en banc*) (finding that "the scope of the judicial inquiry  
8 in an EEOC or any other agency subpoena enforcement proceeding  
9 is quite narrow.") (overruled on other grounds). Thus, while  
10 the Court's function is neither minor nor ministerial, the scope  
11 of issues to be litigated is limited to the question of whether  
12 the agency issued the administrative subpoena for proper  
13 investigatory purposes. Oklahoma Press Publishing, 327 U.S. at  
14 217.

15 An *en banc* panel of the Ninth Circuit Court of Appeals,  
16 following the guidance of Oklahoma Press Publishing and its  
17 progeny, set forth a test for the judicial enforcement of  
18 administrative subpoenas. Under that test, an agency  
19 establishes a *prima facie* case for enforcing an administrative  
20 subpoena if it shows: (1) Congress granted it the authority to  
21 investigate; (2) the agency followed the necessary procedural  
22 requirements for issuing a subpoena; and (3) the evidence sought  
23 is relevant and material to the investigation. Children's  
24 Hospital, 719 F.2d at 1428; see also E.E.O.C. v. Karuk Tribe  
25 Housing Authority, 260 F.3d at 1076 (holding that "courts must  
26 enforce administrative subpoenas unless the evidence sought by  
27  
28

the subpoena is plainly incompetent or irrelevant to any lawful purpose of the agency."). Both the Supreme Court and the Ninth Circuit hold that a declaration from a government official is sufficient to establish a *prima facie* case for the three elements listed above. United States v. Stuart, 489 U.S. 353, 360 (1989); Children's Hospital, 719 F.2d at 1428.

Once EBSA makes this *prima facie* showing, then the court must issue an order to show cause why the administrative subpoena should not be enforced unless Respondent meets its burden of providing compelling reasons why the subpoena should not be enforced or should be enforced only in modified form. United States v. Powell, 379 U.S. 48, 57-58 (1964). Although compelling reasons can preclude enforcement, the only two compelling reasons for non-enforcement identified by the Supreme Court and the Ninth Circuit are that the agency's request is over broad or unduly burdensome. Oklahoma Press Publishing, 327 U.S. at 217; Children's Hospital, 719 F.2d at 1428; F.D.I.C. v. Garner, 126 F.3d 1138, 1143 (9<sup>th</sup> Cir. 1997).

B. The Court Should Enforce EBSA'S Administrative Subpoena Duces Tecum Because the Subpoena Meets the Ninth Circuits' Three-Prong Test for Enforcement.

- 1) *Congress authorized the Secretary to conduct investigations and to issue administrative subpoenas duces tecum in furtherance of the Secretary's ERISA enforcement obligations.*

The Subpoena in this case was issued by EBSA, an agency of the United States Department of Labor. ERISA § 504, 29 U.S.C. § 1134, gives the Secretary broad authority to conduct investigations to determine whether any person has violated or

1 is about to violate any provision of Title I of ERISA or any  
2 regulation or order issued under that Title. This investigatory  
3 power includes the power to issue administrative subpoenas *duces*  
4 *tecum* to compel the production of documents and to have them  
5 enforced by the district court of the United States. Id. The  
6 Ninth Circuit recognizes the Secretary's authority under ERISA  
7 to issue administrative subpoenas and to enforce them in the  
8 district courts of the United States. Dole v. Milonas, 889 F.2d  
9 885, 888 (9th Cir. 1989). In Dole, the Ninth Circuit held:

10           Section 1134(c) of that title [29 U.S.C.]  
11           also makes §§ 9 and 10 of the Federal Trade  
12           Commission Act ("FTC Act"), 15 U.S.C. §§ 49  
13           and 50, relating to compelling the attendance  
14           of witnesses and the production of documents at  
          investigatory proceedings, applicable under  
          ERISA. The incorporated FTC Act provisions  
          authorize the Secretary to petition for enforcement  
          of her ERISA Title I subpoena in district court.

15 Id. Thus, EBSA has statutory authority to issue administrative  
16 subpoenas, such as the one issued here, in furtherance of its  
17 investigation to determine whether any person, including  
18 Respondents, have or are about to violate ERISA, and to have the  
19 district court of the United States enforce such subpoena.

20           2) *EBSA followed the necessary procedural*  
21           *requirements for issuing the administrative*  
          *subpoena duces tecum.*

22           The administrative Subpoena *Duces Tecum* was issued by R.C.  
23 Marshall, Regional Director of the Atlanta Regional Office of  
24 EBSA, who as an authorized representative was delegated  
25 authority from the Secretary to issue the Subpoena and who  
26 determined that the Subpoena was appropriate to issue in  
27 connection with the on-going investigation. JDN Aff., Exh. A.



1 The Subpoena was properly served on Respondents, who  
2 acknowledged receipt of the Subpoena. JDN Aff. at ¶¶ 9-10.  
3 Thus, the agency met the procedural requirements for proper  
4 service of the administrative subpoena.

5 3) *The information sought through the administrative*  
6 *subpoena duces tecum is relevant and material to*  
7 *EBSA's investigation.*

8 Courts give broad latitude in determining whether documents  
9 sought by administrative subpoenas are relevant and material.  
10 In fact, courts extend to administrative investigations and to  
11 subpoenas issued thereunder the same broad latitude as provided  
12 to grand-jury investigations and their subpoenas. Oklahoma  
13 Press Publishing, 327 U.S. at 216; see also United States v.  
14 Weingarden, 473 F.2d 454, 459 n.9 (6th Cir. 1973). The Ninth  
15 Circuit's test for relevance is "whether the information sought  
16 *might assist* in determining whether any person is violating or  
17 has violated any provision of Title I of ERISA." Donovan v.  
18 National Bank of Alaska, 696 F.2d 678, 684 (9th Cir. 1983)  
19 (*emphasis added*). Thus, under controlling precedent, the  
20 Secretary's administrative subpoena *duces tecum* satisfies the  
21 relevance standard where the Secretary demonstrates that the  
22 material requested "might assist" EBSA in determining whether a  
23 violation has occurred. EBSA clearly has the authority to  
24 review such documents in connection with its investigation. As  
25 ERISA makes clear:

26 The Secretary shall have the power, in order  
27 to determine whether any person has violated  
28 or is about to violate any provision of this  
subchapter or any regulation or order  
thereunder to make an investigation . . . and  
to enter such places, inspect such books and

1 records and question such persons as he may  
2 deem necessary to enable him to determine the  
3 facts relative to such investigations, if he  
4 has reasonable cause to believe there may  
5 exist a violation of this subchapter or any  
6 rule or regulation issued thereunder. . . .

7 ERISA § 504(a), 29 U.S.C. § 1134(a).

8 The current investigation of the Plans is being conducted  
9 to determine whether any person has violated or is about to  
10 violate any provision of Title I of ERISA. JDN Aff. at ¶ 2.  
11 The purchase of employer stock in a closely-held corporation by  
12 an ERISA-governed plan from the employer, majority shareholder  
13 or other party-in-interest as defined by section 3(14) of ERISA  
14 is prohibited under section 406(a) and (b) of ERISA. To avoid  
15 these transactions resulting in a violation of ERISA, they must  
16 meet the exemption in section 408, which requires, among other  
17 things, that the stock be purchased at or below fair-market  
18 value.

19 Respondents provide valuations for these closely-held  
20 corporations for the purpose of determining a value at which  
21 ERISA-governed plans will buy employer securities from a party-  
22 in-interest. JDN Aff. at ¶¶ 6-7. Thus, unless Respondents'  
23 valuations are at or below fair-market value, each transaction  
24 in which Respondents have provided a valuation is prohibited and  
25 a violation of ERISA. Accordingly, EBSA's investigation  
26 includes whether Respondents' valuations exceeded fair-market  
27 value. Having reviewed these transactions, including  
28 Respondents' valuations, EBSA has determined that further  
investigation is warranted to determine whether there may be

1 violations of ERISA related to Respondents' valuations. JDN  
2 Aff. ¶ 6.

3 To complete its investigation, EBSA has sought nine  
4 categories of documents, all of which are relevant to this  
5 investigation in that they "might assist" EBSA in determining  
6 whether violations of ERISA have occurred. The first category  
7 seeks documents related to Respondents' fees in providing the  
8 valuations, which is relevant to determining whether fees paid  
9 were reasonable and the amount of disgorgement that might be  
10 sought, if a violation is determined. The second category  
11 requests all documents in any way related to the valuation  
12 services provided to Bruister and the Plans and are directly  
13 relevant to the investigation. The third and fourth categories  
14 seek to identify other ERISA-governed plans for whom Respondents  
15 have provided similar services to allow EBSA to verify  
16 information Respondents provide in response to categories eight  
17 and nine, and assist EBSA in determining whether any violation  
18 of ERISA may have occurred in other similar transactions for  
19 which Respondents provided the valuation. Categories five and  
20 six seek marketing materials and communications related to  
21 Respondents providing valuation services in transactions similar  
22 to those being investigated. Finally, categories eight and nine  
23 seek valuations Respondent has performed for similar  
24 transactions and all underlying documentation, which may, among  
25 other things, shed light on the methodology and validity of the  
26 valuations provided to the Plans and assist EBSA in determining

1 whether violations may have occurred in other transactions for  
2 which Respondents provided the valuation.

3 As the Secretary has made a *prima facie* showing that EBSA  
4 has the authority to issue the administrative Subpoena, that the  
5 Subpoena was properly issued and that the information sought is  
6 reasonably relevant, EBSA is entitled to the issuance of an  
7 order to show cause why the administrative Subpoena should not  
8 be enforced. See Powell, 379 U.S. at 57-58.

9 C. The Court Should Enforce EBSA's Administrative  
10 Subpoena Duces Tecum Because Respondents Have Not  
11 Provided and Cannot Provide Compelling Reasons for  
12 Non-Compliance.

13 Respondents have not objected to categories one, five, six  
14 or seven. Respondents' objections to the other categories  
15 consist of challenging the relevancy of categories three and  
16 four, and asserting that categories 3-4 and 8-9 are vague,  
17 ambiguous, overly broad and burdensome.

18 A challenge to an administrative subpoena on relevancy  
19 grounds must demonstrate that there is no reasonable possibility  
20 that the category of materials the government seeks will produce  
21 information relevant to the general subject of its  
22 investigation. Cf. United States v. R. Enterprises, Inc., 498  
23 U.S. 292, 301 (1992 (addressing grand-jury subpoena). This  
24 principle has been explained as follows:

25 [I]n the pre-complaint stage, an investigative  
26 agency is under no obligation to propound a  
27 narrowly focused theory of a possible future  
28 case. Accordingly, the relevance of the  
agency's subpoena requests may be measured  
only against the general purposes of its  
investigation.

1 F.T.C. v. Texaco, Inc., 555 F.2d 862, 874 (D.C. Cir.), cert.  
2 denied, 431 U.S. 974 (1977). In the previous section, the  
3 Secretary met her burden of showing that the documents "might  
4 assist" in her investigation especially given the "broad  
5 latitude" courts extend to administrative subpoenas. See  
6 Oklahoma Press Publishing, 327 U.S. at 216; National Bank of  
7 Alaska, 696 F.2d at 684; Weingarden, 473 F.2d at 459.

8 Categories three and four seek to identify other ERISA-governed  
9 plans for which Respondents have provided valuation services in  
10 similar transactions. This information will allow EBSA to  
11 verify information Respondents provide in response to categories  
12 eight and nine, and assist EBSA in determining whether any  
13 violation of ERISA may have occurred in other similar  
14 transactions for which Respondents provided the valuation.  
15 Accordingly, Respondents have not and cannot meet their burden  
16 of showing that these documents are not relevant.

17 Respondents remaining objections are similarly without  
18 merit in that the Subpoena sufficiently lists, identifies and  
19 describes the documents being sought and limits them to only  
20 those created since 2002. See JDN Aff., Exh. A. To prevail on  
21 their unduly broad and burdensome objections, Respondents must  
22 show that "compliance will unduly disrupt or seriously hinder  
23 normal business operations." EEOC v. Citicorp Diners Club,  
24 Inc., 985 F.2d 1036, 1040 (10<sup>th</sup> Cir. 1993) (finding allegation  
25 that it would take six months and two employees working full  
26 time on the request insufficient to establish that the request  
27  
28

1 was unduly burdensome); see also EEOC v. Maryland Cup Corp., 985  
2 F.2d, 478, 479 (9<sup>th</sup> Cir. 1993); NLRB v. Carolina Food Processors,  
3 Inc., 81 F.3d 507, 513 (4<sup>th</sup> Cir. 1996); NLRB v. G.H.R. Energy  
4 Corp., 707 F.2d 110, 114 (5<sup>th</sup> Cir. 1982). Here, Respondents have  
5 admitted that they retain very few documents, which should make  
6 the number of responsive documents very limited. Nevertheless,  
7 Respondents claim that it could take hundreds of hours and  
8 thousands of dollars to comply. JDN Aff., Exh. B. Although  
9 that would not likely be unduly burdensome, Respondents were  
10 told they could produce the documents as kept in the ordinary  
11 course of business to substantially reduce their alleged burden.  
12 See Garner, 126 F.3d at 1146 (finding that despite fact that  
13 subpoena sought more than a million documents, appellants failed  
14 to enunciate how the requests constituted a mere fishing  
15 expedition given the scope of the investigation). Respondents  
16 declined the offer. Accordingly, Respondents have not met their  
17 burden of showing that the Subpoena is unreasonable by being  
18 overly broad or burdensome. To the contrary, the documents the  
19 Secretary requested are narrowly focused on documents related to  
20 valuations Respondents performed since 2002, all of which EBSA  
21 understands are located in Donnelly's residential apartment in  
22 Oakland, California. As such, the Subpoena is not indefinite,  
23 unreasonable, or overreaching, but comes within the Secretary's  
24 enforcement powers and must be enforced. See Powell, 379 U.S. at  
25 57-58; Oklahoma Press Publishing, 327 U.S. at 217; Garner, 126  
26 F.3d at 1143; Children's Hospital, 719 F.2d at 1428.

1 **III. CONCLUSION**

2 The Secretary has met her burden of establishing that she  
3 is engaged in legitimate law enforcement inquiries and that the  
4 documents requested in the Subpoena are relevant to those  
5 investigations. Respondents have asserted no reasonable  
6 justification for its refusal to comply with the Subpoena.  
7 Accordingly, for all the reasons set forth above, the Petition  
8 to enforce the Secretary's administrative Subpoena should be  
9 granted.

10  
11 Dated: August 28, 2008

12  
13 GREGORY F. JACOB  
14 Solicitor of Labor

15 STANLEY E. KEEN  
16 Regional Solicitor

17 ROBERT M. LEWIS, JR.  
18 Counsel for ERISA

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20 DANE L. STEFFENSON  
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